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In the Supreme Court of the United States

October Term, 1942.

JANE M. STIMSON and BLANCHE M NEWMAN,
Petitioners,

vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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....., Clerk.

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No.....

JANE M. STIMSON and BLANCHE M NEWMAN,
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vs.

R. C. TARRANT and BARNES, BUTLER OIL COMPANY, a corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Jane M. Stimson and Blanche M. Newman, plaintiffs and appellants below, respectfullyshow:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action to have an oil and gas lease declared terminated by reason of the cessation of the production of oil, pursuant to the "thereafter" clause contained therein, and to have the cloud on the title created thereby removed. (Complt., R. 3-5 & Opin. of Dist. Ct., R. 61). The "thereafter" clause reads:

(Note): References to the record are designated "R", and all emphasis by underscoring are by the authors of this Petition and Brief.

> "It is agreed that this lease shall remain in force for a term of five years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." (R. 6)

No question of "forfeiture" is involved because this lease did or did not terminate "automatically", pursuant to the foregoing "thereafter", clause upon cessation of production.

Production of gas is not involved. (R. 107, 109, 113, 181)

The undisputed facts material to consideration of this petition are as follows:

In December, 1930, petitioners' mother (since deceased) and respondent Barnes, Butler Oil Company entered into an oil and gas lease covering 320 acres of land, now owned by petitioners, in the Cut Bank oil field in Glacier County, Montana. This lease was on a form known as "Producers 88 Montana" (R. 6 & 434) and was, as recited therein,

> "for the sole and only purpose of mining and operating for oil, and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products", (R. 6)

The lease also provided that the lessee should,

> "deliver to the credit of lessor free of cost, in the pipe line to which lessee may connect his wells, the equal one-eighth (1/8) part of all oil and gas produced and saved." (R. 7)

Prior to January, 1938, respondent Tarrant was producing oil from three wells in the northeast corner of Petitioners' land (R. 119-122) and had

sold as royalties from those wells more than fifty of the eighty percent of the oil to which he was entitled under his sub-lease. (R. 190 & 363).

In 1932 respondent Barnes, Butler Oil Company sub-let the land to respondent Tarrant, reserving to itself 7½% of the oil and gas (R. 12).

The complaint alleges (R. 3) and the amended answer (R. 25 & 26) admits that production of oil from petitioner's land began in May, 1933, entirely ceased in January 1938, and that no oil was thereafter produced from that land for approximately fourteen (14) months.

Respondents made no claim that oil could not have been produced from the land involved during the fourteen (14) months of non-production.

Respondents, however, as reasons why they should be relieved from the effect of the admitted non-production of oil alleged, in paragraph XII of their amended answer, (R. 27) and claimed throughout the trial, among other things, that there was no market for oil and that there were no storage facilities available in the field for oil which could have been produced from petitioner's land, and that respondent Tarrant tried to find a market and storage for the oil.

Throughout the trial, petitioners objected to evidence in support of these matters of affirmative defense, on the ground that none of the matters alleged constituted a defense in an action of this kind. This question was presented to the Circuit Court of Appeals by point No. "II" of petitioner's

"Statement of Points on Appeal" (R. 80).

The action was tried before the United States District Court for the District of Montana on December 19, 1940 (R. 90), which court decided that this lease did not terminate pursuant to the "thereafter" clause upon cessation of production. (Findings and Conclusions R. 59). Judgment was rendered for respondents on October 15, 1941 (R. 69).

Petitioners appealed the judgment of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit (R. 77) which court on December 15, 1942 affirmed the judgment, (R. 473). On February 4, 1943 petitioners filed petition for re-hearing which was denied on February 15, 1943 (R. 481).

The Circuit Court of Appeals, in its decision, declared:

> "The problem presented is whether the lease automatically terminated upon the temporary cessation of production of oil for lack of market, pursuant to a clause providing that the lease is to continue for a period of five years and 'as long thereafter as oil or gas, or either of them, is produced.' " (R. 474)

and that:

> "The question is one of Montana law." (R. 475)

Those statements are correct but the Court then proceeded to apply an erroneous interpretation of the decision of the Supreme Court of Montana in *Severson v. Barstow,* 103 Mont. 526, 63 Pac. (2d) 1022, which is the latest decision of that court involving the question presented by this petition.

As pointed out by the Circuit Court of Appeals, the Montana Court in the *Severson* case had "resort to a legal fiction", (R. 478), that, "in the absence of a market", gas is considered produced, when in fact it is not produced.

Having applied that "fiction" to gas, the Montana Court decided that if, in such a situation, the lessee sustained the burden of proving that he had used reasonable diligence to find a market, the lease would not be declared terminated; but further decided that such a fiction would not be applied in a case involving production of oil only. It said:

> "A different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided." (103 Mont. @ 532)

Treating that declaration of the Montana court as "dictum", the Circuit Court of Appeals declined to follow it and applied the rule in this case which the Montana Court specifically said is limited to gas and expressly declared is inapplicable to a case involving, as this case does, only oil.

QUESTIONS PRESENTED.

Two questions of law are presented: First, whether the decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the law of Montana as declared by the Supreme Court of Montana, and, second, whether the decision is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. et al v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19,

which decision petitioners contend is in accord with the law of Montana.

The first question involves the following inquiries:

1. Is the decision of the Circuit Court of Appeals that the lease did not terminate pursuant to the "thereafter" clause upon cessation of production, in conflict with the decisions of the Supreme Court of Montana in *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 Pac. (2d) 187 and *Severson v. Barstow*, 103 Mont. 526, 63 Pac (2d) 1022?

2. Is the italicized portion of the following quotation from the decision in *Severson v. Barstow*, supra, "dictum" as declared by the Circuit Court of Appeals in this case?

> "The court correctly concluded that, 'in the entire absence of a market, the lands * * * * have been since the 11th day of May, in legal contemplation, producing gas in commercial quantities; that said lease is still in force and effect.'
>
> Where, as here, the principal consideration for a lease is the payment of royalty, the lease carries an implied covenant to use reasonable diligence to market the product when produced, although the lease is silent on the subject, and whatever is implied in a contract is as effectual as what is expressed; in an action to cancel such a lease, the burden rests upon the lessee to establish the fact of reasonable diligence if he would prevent cancellation. *Berthelote v. Loy Oil Co.*, 95 Mont. 434, 28 P. (2d) 187. The lessees here met this requirement, and, while a different rule prevails with relation to oil wells, as oil, unlike gas, may be stored and divided, in legal contemplation, under the facts shown, this

gas well was 'producing' within the meaning of the lease. *Mills & Willingham on Oil and Gas,* 121; *Berthelote v. Loy Oil Co.,* supra; *Pelham Petroleum Co. v. North,* 78 Ok. 39, 186 P. 1069."

3. Is the decision in conflict with decisions of the Supreme Court of Montana deciding that:

(a) A contract may not be changed under the guise of interpretation; where a contract is plain and clear in its terms, neither interpretation nor construction is permissable. (*McDaniel v. Hager-Stevenson Oil Co.,* 75 Mont. 356, 243 Pac. 582);

(b) Courts must enforce contracts as made, not make new ones for the parties no matter how unreasonable the terms may appear. (*Story Gold Dredging Co. v. Wilson,* 99 Mont. 347, 42 Pac. (2d) 1003);

(c) When a contract is optional in respect to one party, it is to be construed strictly in favor of the party that is bound and against the one who is not bound, and oil and gas leases are to be construed liberally in favor of the lessor and strictly against the lessee. (*McDaniel v. Hager-Stevenson Oil Co.,* supra).

4. Has the legal fiction that oil, as distinguished from gas, is produced when in fact it is not produced (indulged in by the Circuit Court in this case), ever been resorted to in Montana?

5. Is the decision insofar as it sustains the admission of, and is based upon evidence in support of the matters of affirmative defense, including alleged lack of market, as set forth in paragraph

XII of the amended answer, in conflict with the law of Montana as declared by the decisions of the Supreme Court of that State?

JURISDICTION.

Petitioners, appellants in the Circuit Court of Appeals, invoke the jurisdiction of this Court under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Section 347, U. S. C. A.) and the decision of this Court in the case of *Erie R. Co. v. Tompkins,* 304 U. S. 64. Petitioners also rely on paragraph 5 (b) of Rule 38 of this Court.

Petitions for writs of certiorari to review decisions of the United States Circuit Court of Appeals, which have failed to follow the laws of the several states, have been heretofore granted by this Court in many cases, including *Six Companies of California v. Joint Highway District No. 13,* 311 U. S. 180, *Cities Service Oil Company v. Dunlop,* 308 U. S. 208, and *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U. S. 487.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A.

The decision of the Circuit Court of Appeals (involving an important question of Montana law), that the lease did not automatically terminate, pursuant to the "thereafter" clause, upon cessation of

production is in conflict with decisions of the Supreme Court of that state in the following cases:

Berthelote, et al v. Loy Oil Co., et al., 95 Mont. 434, 28 Pac. (2d) 187;
Severson, et al v. Barstow, et al., 103 Mont. 526, 63 Pac. (2d) 1022;
McDaniel v. Hager-Stevenson Oil Co., 75 Mont. 356, 243 Pac. 582;
McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 Mont. 332, 247 Pac. 166;
Story Gold Dredging Co. v. Wilson, 99 Mont. 347, 42 Pac. (2d) 1003.

B.

That the Circuit Court of Appeals, in refusing to be bound by or to follow decisions of the Supreme Court of Montana, failed to follow the decisions of the United States Supreme Court in the following cases:

Erie R. Co. v. Tompkins, 304 U. S. 64;
Cities Service Co. v. Dunlop, 308 U. S. 208;
Six Companies of California v. Joint Highway Dist. No. 13, 311 U. S. 180;
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487.

C.

That the decision of the Circuit Court of Appeals is also in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Continental Oil Co. v. Osage Oil & Refining Co.*, 69 Fed. (2d) 19, which decision petitioners contend is

in accord with the decisions of the Supreme Court of Montana.

D.

In view of the fact that production of oil is one of Montana's principal industries and the further fact, which is a matter of common knowledge, that practically every oil lease has a "thereafter" clause identical with, or substantially the same as the one in this case, the question involved is of the utmost importance.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals the case numbered and entitled on its docket, No. 10067, Jane M. Stimson and Blanche M. Newman, Appellants, vs. R. C. Tarrant and Barnes, Butler Oil Company, a corporation, Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals

be reversed by this Court, and for such other and further relief as may be proper.

Dated, Helena, Montana, March 31, 1943.

M. S. GUNN,
of Helena, Montana,
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Of Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioners' attorneys in the above entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, Helena, Montana, March 31, 1943.

M. S. GUNN,
Attorney for Petitioners Jane M. Stimson and Blanche M. Newman.